

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HALL & ASSOCIATES
1620 I St., N.W.
Suite 701
Washington, D.C. 20006,

Plaintiff,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY
1200 Pennsylvania Avenue, N.W. (2822T)
Washington, D.C. 20460,

Defendant.

Civil Action No. _____

COMPLAINT

Preliminary Statement

1. Through this action, brought under the Freedom of Information Act (“FOIA”), 5 U.S.C. §§ 552 *et seq.*, as amended, Plaintiff, Hall & Associates (“H&A”), appeals the Defendant’s, Environmental Protection Agency Headquarters’ (“EPA HQ”), (1) failure to provide H&A with full and complete FOIA responses and (2) excessive fees charges for the work performed.

2. The Great Bay Municipal Coalition (“the Coalition”) which is comprised of municipalities that discharge directly into the Great Bay Estuary or into its tributaries. These municipalities are adversely impacted by EPA’s determination that they must achieve a transparency-based 0.3 mg/l TN (total nitrogen) instream requirement to allow eelgrass populations to recover. As explained in more detail below, the unprecedentedly-stringent

nutrient limitations were based on the New Hampshire Department of Environmental Services (“DES”) draft 2009 Numeric Nutrient Criteria document (“2009 Criteria document”), which the Coalition believes to be scientifically flawed. The Coalition asked EPA HQ to look into allegations of science misconduct on the part of EPA Region 1 in developing nutrient limitations for the Great Bay communities and its reliance on the 2009 Criteria document. EPA HQ responded stating it found Region I had not engaged in scientific misconduct, but did not offer any explanation to how it rendered its decision. H&A filed nine FOIA requests, on behalf of the Coalition, to obtain the basis and rationale for this decision. The Coalition’s particular interest in the requested documents is that the Coalition’s communities have received final NPDES permits or have been told by EPA that they will be receiving NPDES permits from EPA Region 1, based upon the 2009 Criteria document.

3. FOIA requires federal agencies to respond to public requests for documents, including the search and production of files maintained electronically, in order to increase public understanding of the workings of government and access to government information.

4. H&A submitted a series of FOIA requests that, by EPA’s own admission, sufficiently articulated what records H&A sought. Each of the requests specifically asked for “all records” showing a statement made by H&A was, in fact, false. H&A was not asking EPA to do any further analysis or answer questions. Instead, H&A simply asked EPA to produce the records it relied upon in making a determination that Region 1 had not engaged in science misconduct. Nevertheless, EPA HQ did not provide any responsive documents because it found the requests too “confusing.” H&A believes that EPA HQ’s actions were purposeful and represent a bad faith effort on the part of the Agency not to respond to H&A’s FOIA requests.

5. Additionally, the fee charged by EPA for processing the Coalition's FOIA requests is inconsistent with the work performed and excessive in light of the sparse documents provided. EPA effectively admits that the fee is based on search and review time for FOIA requests it found too confusing to answer. Moreover, a majority of the documents supplied by EPA were documents originally supplied to EPA by the Coalition. Finally, the excessive fee was in direct contradiction to the request's instructions that EPA should "contact the undersigned if the associated search and duplication costs are anticipated to exceed \$250.00." Thus, EPA's fee is excessive and an abuse of the FOIA process.

6. EPA's refusal to respond to these FOIA requests is also inconsistent with Executive Office Policy on FOIA compliance issued by President Barack Obama on January 21, 2009. The Executive Memorandum states:

The Freedom of Information Act should be administered with clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failure might be revealed, or because of speculative or abstract fears. ... All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

Jurisdiction

7. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the Defendant pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

Venue

8. Venue is appropriate under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391.

Parties

9. Plaintiff, H&A, is a Professional Limited Liability Company organized under the laws of the District of Columbia. H&A's primary purpose is to serve as a regulatory consultant and/or special counsel to municipal and private entities regarding environmental matters. Specifically, the firm has addressed wastewater regulatory issues in every EPA Region, over 40 states, and at EPA HQ in Washington, D.C.

10. Defendant, EPA HQ, is an agency of the federal government of the United States, within the meaning of 5 U.S.C. § 552(e), and whose headquarters is located in Washington, D.C. EPA HQ is in possession and/or control of the records requested by H&A which are the subject of this action.

Factual Allegations

11. On May 4, 2012, on behalf the Coalition, H&A submitted a letter ("science misconduct letter") to EPA Administrator Lisa Jackson and Inspector General Arthur A. Elkins, Jr. requesting (1) a review of the Great Bay water quality criteria compliance and permitting be withdrawn from EPA Region I and transferred to an independent panel of experts who can assess the scientific basis of the Region's position and (2) the Region's actions leading to that request be investigated by the Office of Inspector General. (*See* Exhibit 1). This request was submitted in response to EPA Region I issuing three draft NPDES permits for Exeter, NH, NPDES Permit No. NH0100871 (released Mar. 25, 2011); Newmarket, NH, NPDES Permit No. NH0100196 (released Nov. 5, 2011); and Dover, NH, NPDES Permit No. NH0101311 (released Jan. 6, 2012) *available at* http://www.epa.gov/region1/npdes/draft_permits_listing_nh.html, which contained a 0.3 mg/l TN instream requirement to improve transparency and allow eelgrass recovery in the tidal rivers and Great Bay.

12. By letter dated September 27, 2012, Nancy Stoner, EPA's Acting Assistant Administrator for Water, responded to the Coalition's letter by stating EPA HQ "has not seen any evidence that Region I engaged in scientific misconduct." (*See Exhibit 2*). The letter did not offer any explanation as to why the specific allegations raised by the Coalition were actually in error or false.

13. By letter dated October 4, 2012, on behalf of the Coalition, H&A submitted a FOIA request to EPA HQ which sought disclosure of records relied upon by the EPA's Office of Water and the Interim Science Integrity Official to determine that scientific misconduct on the part of EPA Region 1 has not occurred. (*See Exhibit 3*). Specifically, the request asked for:

- a. Emails or correspondence between EPA Headquarters and any outside party including, but not limited to, EPA Region 1, New Hampshire Department of Environmental Services, Conservation Law Foundation, or Dr. Fred Short regarding the Coalition's allegations.
- b. The administrative record, excluding emails from the Coalition or the Coalition's counsel, relied upon by EPA Headquarters in rendering the decision that no scientific misconduct has occurred in this case.
- c. Any documents, developed by EPA Headquarters or its contractors, including fact sheets, internal assessments, briefing memorandums, meeting minutes, which evaluated and/or discussed whether or not EPA Region 1 engaged in scientific misconduct.

(*See Exhibit 3*, at 2).

14. This FOIA request was assigned reference number EPA-HQ-2013-000197 in the confirmation email sent to H&A on October 5, 2012. (*See Exhibit 4*).

15. Additionally, by letters dated October 22, 2012, H&A submitted a series of eight FOIA requests to EPA Headquarters, which sought disclosure of correspondence associated with the Coalition's May 4, 2012, science misconduct letter and EPA's September 27, 2012, response.

Specifically, seven of the requests sought all records or factual analyses that showed the following statements taken from the Coalition's May 4th science misconduct letter were incorrect:

- a. EPA was under contract to assist the State of New Hampshire on nutrient criteria development and was fully aware of the studies showing nitrogen increases in the estuary had not caused adverse impacts on water quality parameters such as algal levels or transparency. EPA asserted nutrient criteria had to be developed in any event and promoted a transparency approach to regulate TN. (*See Exhibit 5*).
- b. Although available data in 2008 did not show the Great Bay Estuary was nutrient impaired, EPA asked DES to change the impairment listing to "nitrogen impaired" to avoid a potential lawsuit with Conservation Law Foundation. (*See Exhibit 6*).
- c. EPA first informed the state it must formally adopt the new numeric criteria and then, after Conservation Law Foundation threatened to sue EPA if Great Bay wasn't listed as nutrient impaired, EPA told the state criteria adoption wasn't needed. (*See Exhibit 7*).
- d. The documentation provided to the peer reviewers excluded the numerous prior analyses and data evaluations (most of which were developed by DES and presented to EPA) that confirmed (1) nitrogen had not caused excessive plant growth in the system; (2) system transparency had never changed during the period of apparent eelgrass decline; (3) color and turbidity, not nutrients, controlled system transparency; (4) the causes of changing of eelgrass populations were unknown; and (5) Great Bay was not a "transparency-limited" system. (*See Exhibit 8*).
- e. The peer review occurred without considerations of EPA's 2009 Science Advisory Board peer review, which concluded the type of "stressor-response" analysis used to generate the stringent TN criteria was not "scientifically defensible," did not demonstrate "cause and effect," and could misallocate local resources. (*See Exhibit 9*).
- f. The numeric criteria document developed by DES, with EPA's assistance, did not include the prior information and findings of studies confirming that TN criteria for eelgrass and DO were not based on a demonstrated "cause and effect" relationship therefore, both the State of New Hampshire and EPA knew that these

numeric criteria were based on confounded correlations that did not show TN caused the claimed changes in either transparency or DO. (*See* Exhibit 10).

- g. EPA insisted transparency-based TN criteria must be applied to the tidal rivers (Squamscott, Lamprey, and Upper Piscataqua) and continued to issue permits knowing: Transparency in the major tidal rivers is poor, but the available data shows that (1) the effect of algal growth on transparency is negligible, (2) CDOM and turbidity are the key factors controlling transparency in the system, and (3) regulating TN in the tidal rivers will now result in any demonstrable improvement in transparency. (*See* Exhibit 11).

16. These seven FOIA requests were respectively assigned the following reference numbers in the confirmation emails sent from the FOIA online system on October 22, 2012: EPA-HQ-2013-000711, EPA-HQ-2013-000712, EPA-HQ-2013-000713, EPA-HQ-2013-000714, EPA-HQ-2013-000715, EPA-HQ-2013-000716, and EPA-HQ-2013-000717. (*See* Exhibits 12-18, the respective confirmation emails).

17. Finally, by letter dated October 22, 2012, on behalf of the Coalition, H&A submitted a FOIA request to EPA, which sought:

- (1) a copy of all materials (other than the 2009 Numeric Nutrient Criteria document) provided to the peer reviewers and (2) any records indicating whether the peer reviewers were allowed to review comments developed by the Coalition, or its representatives, after the 'public comment period' for the 2009 [Numeric Nutrient] Criteria document, when it was learned that a peer review was ongoing.

(*See* Exhibit 19 (emphasis in the original)).

18. This FOIA request was assigned reference number EPA-HQ-2013-000723 in a confirmation email sent to H&A on October 22, 2012. (*See* Exhibit 20).

19. On November 16, 2012, EPA released the final NPDES Permit for the town of Newmarket, NH, NPDES Permit No. NH0100196, *available at* http://www.epa.gov/region1/npdes/permits_listing_nh.html.

20. By letter dated November 30, 2012, EPA provided a joint response to all nine FOIA requests. (*See* Exhibit 21). EPA provided four responsive documents for request EPA-HQ-2013-000197. With regard to the other eight FOIA requests, EPA objected to the requests because “they do not reasonably describe the records being sought . . . and improperly request that the Agency conduct analysis and research and formulate opinions.” (*Id.* at 1). However, EPA, in the sentence before, summarized exactly what the eight FOIA requests sought: “Each of the other eight FOIA request [the October 22nd FOIA requests] seek records or factual analysis that disprove a particular factual statement in the Great Bay Coalition’s May 4, 2012, letter to EPA.” (*Id.*) Additionally, EPA assessed a consolidated fee of \$615 despite its sparse response and the fact the Agency could, apparently, only understand one of the FOIA requests. (*Id.* at 2.). The letter further notified H&A of its right to appeal EPA HQ’s determination. (*Id.*).

21. Additionally, on December 12, 2012, EPA released the final NPDES Permit for the town of Exeter, NH, NPDES Permit No. NH0100871, *available at* http://www.epa.gov/region1/npdes/permits_listing_nh.html. To date, the town of Dover, NH, NPDES Permit has not been finalized.

22. By letter dated December 20, 2012, H&A appealed EPA HQ’s adverse determinations. (*See* Exhibit 22). Specifically, H&A appealed EPA HQ’s determination that the October 22nd FOIA requests were insufficiently clear (*Id.* at 3-4) and EPA’s excessive and inappropriate bill of \$615. (*Id.* at 2-3).

23. By letter dated January 3, 2013, EPA confirmed receipt of H&A December 20, 2012 FOIA Appeal letter. (*See* Exhibit 23).

24. By letter dated January 17, 2013, EPA issued an interim response to the nine outstanding EPA HQ appeals and stated it would be consolidating them with eighteen Region 1

FOIA requests (EPA-R1-2013-000014 through EPA-R1-2013-000031) because they were “related to the same general subject.” (*See* Exhibit 24 at 1). EPA stated it would need more time to respond to the twenty-seven FOIA appeals in order to “consult with the appropriate program offices in Region 1 and Headquarters.” (*Id.*). The letter stated EPA “expect[ed]” to respond within 20 days. (*Id.* at 2).

25. By letter dated January 28, 2013, H&A objected to EPA’s decision to consolidate the EPA HQ and Region 1 appeals. (*See* Exhibit 25). Specifically, H&A stated that, although both set of FOIA appeals dealt with the Office of Water’s determination that Region 1 had not engaged in any scientific misconduct, the nature of the requests and issues under appeal were different. (*Id.*). The EPA HQ FOIA appeals challenged the Headquarters’ determination that the FOIA requests were insufficiently clear and whether the fee assessed was excessive and inappropriate for the work performed. (*Id.*). The Region 1 FOIA appeals concern the nonresponsive nature of the documents provided by the Region and the Region’s decision to redact factual information in one of the documents provided. (*Id.* at 1-2.). The Region 1 appeals also addressed the inappropriate fee associated with the Agency’s eight-and-a-half hour review of eighteen pages of documents. (*Id.* at 2.).

26. By letter dated February 15, 2013, EPA issued its final determination only on the nine outstanding EPA HQ FOIA appeals. (*See* Exhibit 26) (EPA HQ issued a separate letter addressing the Region 1 FOIA appeals and a separate complaint is being filed with this Court in regards to those eighteen Region 1 FOIA requests). EPA granted the appeal in part and denied it in part. (*Id.*). The appeal was granted in part with respect to the fees charged. (*Id.* at 1). EPA remanded the bill to the Office of Water to recalculate the fees. (*Id.*). To date, H&A has not received a recalculated bill from the Office of Water with respect to these FOIA appeals. With

respect to seven of the October 22nd FOIA requests (EPA-HQ-2013-000711 to EPA-HQ-2013-000717), the appeal was denied stating the requests “were articulated in the form of an interrogatory-like question ... Such a formulation is not a proper FOIA request.” (*Id.* at 2.). Regarding the eighth FOIA request submitted on October 22nd (EPA-HQ-2013-000723), EPA HQ stated that because “there may be potentially responsive documents for part of the underlying request located in Region 1” (*Id.* at 2) the request is being referred to Region 1. To date, H&A has not received any response from Region 1 with regards to EPA-HQ-2013-00723 appeal. In addition, all nine FOIA requests were assigned new tracking numbers for the appeal: requests EPA-HQ-2013-00711 to EPA-HQ-2013-00717 were assigned appeal numbers EPA-HQ-2013-2414-A to EPA-HQ-2013-2420-A, respectively. FOIA request EPA-HQ-2013-000197 was assigned appeal number EPA-HQ-2013-2413-A and FOIA request EPA-HQ-2013-000723 was assigned appeal number EPA-HQ-2013-2421-A.

Count I: Violation of the Freedom of Information Act

27. Paragraphs 1 through 24 are hereby incorporated by reference.
28. EPA’s failure to provide a legitimate basis and rationale for withholding responsive documents is in violation of FOIA. 5 U.S.C. § 552(a)(4)(B).
29. EPA’s failure to fully and completely respond to each of H&A’s individual FOIA requests violates the express provision of FOIA. 5 U.S.C. § 552(a)(3).
30. EPA’s assessment of \$615.00 for processing the Coalition’s FOIA requests is inconsistent with the work performed and excessive in light of the four documents provided. EPA spent 3 hours searching for responsive documents and 12 hours reviewing documents on FOIA requests that EPA admits it found too confusing to answer. Therefore, EPA is charging for

FOIA responses it made no attempt to answer. Even if EPA considers the \$615 fee to apply only to the October 4th FOIA request, the fee is excessive and inconsistent with the work performed. Of the four responsive documents EPA provided to the Coalition, two were documents earlier submitted by the Coalition to EPA. The Coalition's FOIA requests expressly states "emails from the Coalition or the Coalition's counsel" should be excluded from the responses. However, EPA wasted its time and resources providing these documents. The two other responsive documents included an email attaching an EPA general policy statement and a letter from CLF. Assessing a fee of \$615 for producing two responsive documents is excessive and an abuse of the FOIA process.

31. H&A believes that EPA HQ's actions on these responses were done in an attempt to shield the fact that the Agency is unlawfully imposing nutrient limitations that are both legally flawed and scientifically unsupported. EPA has refused to produce documents, which contrary to EPA HQ's assertions, were adequately described in the FOIA requests. By feigning ignorance, EPA HQ neither had to produce nor, at a minimum, identify those records responsive to H&A requests. As EPA HQ admitted the scope of H&A's request, and other Regions have had no difficulty responding to similar requests, EPA has failed to provide a full and complete response to H&A's request.

32. EPA HQ's refusal to answer these FOIA requests is a sham. EPA is attempting to cover up that it made no reasonable assessment into whether the Region had engaged in science misconduct and an attempt to avoid admitting the science misconduct issues raised were scientifically and factually correct.

33. EPA HQ is refusing to answer the same type of questions that EPA R1 answered after minor clarifications were provided. Earlier similarly worded FOIA requests require no

clarification. The refusal to respond to these FOIA requests was done to shield EPA from disclosing that no rational scientific basis exists for these permit actions.

Relief Requested

WHEREFORE, Plaintiff, H&A, prays that this Court:

- (1) Maintain jurisdiction over this action until EPA is in compliance with FOIA, and every order of this Court;
- (2) Enjoin EPA from charging Plaintiff unreasonable fees given the work performed;
- (3) Enjoin EPA from withholding all responsive records, or portions thereof, that were requested by Plaintiffs to be released and order their immediate disclosure to Plaintiff;
- (4) Order EPA to respond to each of Plaintiff's requests fully and completely in a manner that will allow H&A to gauge the adequacy of the response;
- (5) Award reasonable costs and attorneys' fees to H&A as provided in 5 U.S.C. § 552(a)(4)(E) and/or 28 U.S.C. § 2412(d); and
- (6) Grant such other relief as the Court may deem just and proper.

Respectfully submitted,



Philip D. Rosenman, Esq.
D.C. Dist. Ct. Bar #975334

Hall & Associates
1620 I St. N.W., Suite 701
Washington, D.C. 20006
Telephone: (202) 463-1166
Facsimile: (202) 463-4207
E-mail: prosenman@hall-associates.com

Date: May 31, 2013